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United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Thirty-sixth session
Vienna, 29 October–2 November 2018

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where

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the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The thirty-sixth session of the Working Group will be held at the Vienna International Centre, from 29 October to 2 November 2018. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 to 5 p.m., except on Monday, 29 October 2018, when the session will be opened at 10 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Possible reform of investor-State dispute settlement (ISDS)

(a) Previous deliberations

5. At its fiftieth session, the Commission had before it Notes by the Secretariat on Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration (A/CN.9/915); on Possible future work in the field of dispute settlement: Ethics in international arbitration (A/CN.9/916); and on Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on Investor-State Dispute Settlement Framework (A/CN.9/918 and addenda).

6. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

7. The Commission has also decided to retain two related topics in the field of investment arbitration on its agenda for further consideration: possible future work on concurrent proceedings and on ethics for arbitrators.[2] The Commission may consider whether to mandate a working group to undertake work in either or both of them at a future time.[3]

8. At its thirty-fourth session, the Working Group commenced work on consideration of possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.

[2] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 175–186.

[3] Ibid., para. 195.

Working Group with respect to certain issues (including procedural aspects of the arbitral process, outcomes, and transparency) are set out in documents A/CN.9/930/Rev.1 and A/CN.9/930/Add.1/Rev.1.

9. At its thirty-fifth session, the Working Group continued its deliberations on consideration of possible reform of ISDS on the basis of the above-referenced Note by the Secretariat (A/CN.9/WG.III/WP.142) as well as (a) submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143); (b) submissions from the European Union (A/CN.9/WG.III/WP.145); (c) submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators (A/CN.9/WG.III/WP.146); and (d) comments by the Government of Thailand (A/CN.9/WG.III/WP.147). The deliberations and decisions of the Working Group with respect to certain issues (including outcomes of the arbitral process, and arbitrators and decision-makers) are set out in document A/CN.9/935.

10. Taking note of the progress made by the Working Group, the Commission, at its fifty-first session, expressed its satisfaction with the progress made and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.[4]

11. In that context, the Commission expressed its appreciation for the contributions to the UNCITRAL Trust Fund from the European Union and the Swiss Agency for Development and Cooperation, aimed at allowing participation of developing States in the deliberations of the Working Group, and ongoing efforts by the Secretariat to secure additional voluntary contributions. The Commission also welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group, and ensuring that the process would remain inclusive and fully transparent. The Commission further expressed its appreciation for the provision of information to assist the Working Group in its deliberations from various stakeholders, as well as for proposals by an Academic Forum and a Group of Practitioners to make information from their research and experience available to the Working Group. Lastly, the Commission welcomed the invitation of the Republic of Korea to an intersessional regional meeting on ISDS reform, to be held in Incheon, Republic of Korea, on 10 and 11 September 2018.[5]

(b) Documentation

12. At its thirty-sixth session, the Working Group is expected to continue its consideration of possible reform of ISDS based on the following documents:

- Document A/CN.9/WG.III/WP.149, which sets out the concerns discussed in the Working Group and a framework for its future discussion;
- Documents A/CN.9/WG.III/WP.150-152, which respectively provide additional information on (i) consistency, including coherence, predictability and correctness of the outcome of ISDS, (ii) arbitrators and decision-makers, and (iii) costs and duration;
- Document A/CN.9/WG.III/WP.153, a note submitted jointly by the secretariats of UNCITRAL and ICSID on elements of a code of ethics for arbitrators/adjudicators; and
- Document A/CN.9/WG.III/WP.154, a report of the first intersessional regional meeting on ISDS reform, held in Incheon, Republic of Korea, on 10 and 11 September 2018.

13. Should further submissions be received from States or International Intergovernmental Organizations, they will be made available on the UNCITRAL

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 145.

[5] Ibid., paras. 142–144 and 146.

webpage for Working Group III (http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

14. A limited number of the following background documents will be made available at the session:

- Reports of the United Nations Commission on International Trade Law on the work of its forty-eighth session (*Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17)); forty-ninth session (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17)); fiftieth session (*Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17)); and fifty-first session (*Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17));
- Note by the Secretariat on possible reform of ISDS (A/CN.9/WG.III/WP.142) as well as submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143 and A/CN.9/WG.III/WP.146), from the European Union (A/CN.9/WG.III/WP.145); and comments by the Government of Thailand (A/CN.9/WG.III/WP.147);
- Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session Part I (A/CN.9/930/Rev.1) and Part II (A/CN.9/930/Add.1/Rev.1); and
- Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (A/CN.9/935).

15. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Adoption of the report

16. The Working Group may wish to adopt, at the close of its session, a report for submission to the fifty-second session of the Commission, scheduled to be held in Vienna, from 8 to 26 July 2019. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting (on Friday afternoon) and subsequently incorporated into the report.

IV. Scheduling of meetings

17. The thirty-fifth session of the Working Group will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,[6] the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

18. The Working Group may wish to note that its thirty-seventh session is scheduled to be held in New York, from 1 to 5 April 2019.

[6] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381.